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QUESTION PRESENTED

Did Congress intend in 1964 to extend the employment discrimination provisions of the Civil Rights Act of 1964 overseas to regulate the practices of U.S. employers of U.S. citizens in workplaces outside the United States?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

Nos. 89-1838 and 89-1845

ALI BOURESLAN and
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioners,

v.

ARABIAN AMERICAN OIL COMPANY and
ARAMCO SERVICES COMPANY,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENTS ARABIAN AMERICAN OIL COMPANY AND ARAMCO SERVICES COMPANY

OPINIONS BELOW

The *en banc* decision of the court of appeals is reported at 892 F.2d 1271 (Pet. App. 1a-27a).[1] The panel decision is reported at 857 F.2d 1014 (Pet. App. 28a-76a). The district court decision that was affirmed by both the panel and the *en banc* court is reported at 653 F. Supp. 629 (Pet. App. 77a-82a).

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[1] "Pet. App." refers to the Appendix to the Petition for Certiorari filed by the Solicitor General on behalf of the EEOC in No. 89-1838. "J.A." refers to the Joint Appendix filed by the parties in this Court.

STATUTORY PROVISIONS INVOLVED

The most relevant provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 ("Title VII"), and of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621-634, are set out in Appendix A, 1a-5a.

STATEMENT OF THE CASE

At all relevant times, the Arabian American Oil Company ("Aramco") was a Delaware corporation whose principal place of business and records were located in Dhahran, Saudi Arabia. Since its inception and until recently, Aramco's business had been the exploration for and the production, refining and sale of oil and gas exclusively in Saudi Arabia. Aramco Services Company ("ASC"), formerly a subsidiary of Aramco, is a Delaware corporation headquartered in Houston, Texas. J.A. 21.[2]

Petitioner Boureslan is a naturalized American citizen of Lebanese origin, who "is by race an Arab, whose religion is Moslem." J.A. 7. Boureslan was employed as a cost engineer by ASC in Houston. At his request he was transferred to Saudi Arabia and became employed by Aramco. J.A. 21, 34. He remained at Aramco for nearly four years until his employment was terminated in Saudi Arabia as part of a general reduction in force. J.A. 24, 33.

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[2] Aramco employed a multinational workforce, including Saudi Arab and U.S. citizens as well as citizens of many other countries. It was owned by Transocean Chevron Company, Exxon Overseas Corporation, Mobil International Petroleum Corporation and Texaco International Trader, Inc. Following the creation in 1988 of the national oil company of Saudi Arabia, the Saudi Arabian Oil Company (Saudi Aramco), substantially all of the assets, business and employees of Aramco were transferred to Saudi Aramco. ASC now is a wholly owned subsidiary of Saudi Aramco. Aramco has filed a Certificate of Dissolution in Delaware, but remains a body corporate under Delaware law for certain purposes, including this litigation.

In charges filed with the Equal Employment Opportunity Commission ("EEOC"), Boureslan alleged that his immediate supervisor (a citizen of the United Kingdom) discriminated against him on the basis of national origin, race and religion during part of the period he was employed by Aramco in Saudi Arabia. J.A. 31-32. He later brought suit against Aramco and ASC in the United States District Court for the Southern District of Texas, alleging violations of Title VII and state law. J.A. 7-10.

Aramco and ASC each moved to dismiss Boureslan's complaint for lack of subject matter jurisdiction, asserting that Title VII did not apply to Boureslan's employment by Aramco in Saudi Arabia. J.A. 11-19. In its motion to dismiss, Aramco noted that the Labor and Workmen Law of the Kingdom of Saudi Arabia "applies to all employment within Saudi Arabia" and that "application of Title VII in this case would unduly infringe on the sovereign right of the Kingdom of Saudi Arabia to regulate employment within its borders." J.A. 12. Aramco's motion was supported by the Declaration of Ismail S. Nazer, an expert on Saudi law, who described the Labor and Workmen Law and its application both to Saudi Arab and foreign nationals working in Saudi Arabia:

> . . . The Kingdom of Saudia Arabia has an extensive code, the Labor and Workmen Law of 1969, which regulates all employment within its borders, including that of citizens of foreign countries. This Code contains numerous substantive provisions and a procedural framework consisting of two judicial commissions by which aggrieved persons may vindicate their rights under the code. These commissions make no distinction between citizens of Saudia Arabia and foreign nationals who work in Saudi Arabia.

J.A. 27-28.

The district court dismissed the complaint, finding that the language and legislative history of Title VII lacked any clearly expressed statement of intent by Congress to

apply Title VII extraterritorially. Pet. App. 79a-81a. The court applied the presumption, articulated by this Court in *Foley Bros., Inc.* v. *Filardo*, 336 U.S. 281 (1949), that statutes are generally presumed not to have extraterritorial application, and concluded:

> It is doubtful that Congress reserved the question of Title VII's application for the courts to decide. It is much more likely that Congress never considered the issue.

Pet. App. 81a.

A divided panel of the United States Court of Appeals for the Fifth Circuit affirmed the district court's decision. The majority held that a statute should not be applied extraterritorially absent a clear expression of intent by Congress. It found no such clear expression of intent in the language of Title VII and concluded that the three general statements from the legislative history cited by the EEOC "[fell] far short of the clear expression of congressional intent required to overcome the presumption against extraterritorial application." Pet. App. 38a. The panel found that Congress simply "did not turn its attention to the possibility" of the extraterritorial application of Title VII, and "[i]t is not for this court to decide this policy issue for the legislative branch." *Id.* at 41a.

The dissent conceded that territoriality "is considered the normal, and nationality an exceptional, basis for the exercise of jurisdiction." Pet. App. 44a n.2 (quoting Restatement (Third) Foreign Relations Law of the United States ("Restatement (Third)") § 402 comment b (1986)). It also acknowledged the presumption that Congress intends legislation to apply only within the territorial jurisdiction of the United States unless a contrary intent appears. Pet. App. 43a-44a. The dissent nevertheless concluded that Title VII applies to U.S. employers employing U.S. citizens overseas. It did not rely, however, on "the broad jurisdictional language" of Title

VII because "requiring a 'clear' expression of congressional intent may mean that the broad jurisdictional language of a statute is not sufficient in itself to support the exercise of extraterritorial jurisdiction." *Id.* at 45a.

On rehearing *en banc*, the court reaffirmed the district court's dismissal of Boureslan's complaint by a vote of 9-5. Pet. App. 1a-2a, 7a. It concluded that neither the provisions of Title VII nor the legislative history demonstrate a "clear congressional intent" to apply the Act to employers outside the borders of the United States. Pet. App. 2a-3a. The court rejected the argument that a negative inference from the alien exemption provision was a clear expression of congressional intent to apply Title VII extraterritorially. *Id.* at 4a. It found that both the statutory provisions and the legislative history of Title VII demonstrate a strong "domestic focus," noting that they make repeated references to "United States," "states," and "state proceedings," with no parallel references to foreign countries or procedures. *Id.* at 5a, 39a-40a.

SUMMARY OF ARGUMENT

The question in this case is whether Congress intended in 1964 to extend the employment discrimination provisions of the Civil Rights Act to regulate the practices of U.S. employers of U.S. citizens in workplaces outside the United States. It is not whether it would have been good policy then, or would be now, to apply Title VII of the Act overseas, but rather whether the statutory language reflects clearly a congressional intent to so apply Title VII.

I. The passage of the Civil Rights Act of 1964 was the culmination of a 20-year struggle to enact a bill to eradicate discrimination within our own borders. In the extensive legislative history of the Civil Rights Act of 1964, there was evident concern and discussion about discrimination in employment, education, voting and public accommodations within the United States, but no expression of concern or any evidence that Congress actually

thought about and chose to address employment discrimination involving U.S. citizens in foreign workplaces. To argue that Congress actually intended that Title VII apply beyond our borders, and that either the definition of "commerce" in the Act or a negative inference drawn from the so-called "alien exemption provision," separately or in combination, constitute a clear expression by Congress of such an intent, is wishful thinking.

A. Decisions of this Court have firmly established the strong presumption that legislation of Congress is meant to apply only within the territorial jurisdiction of the United States absent a clear indication from Congress that it intends to apply the legislation beyond our borders. That presumption is based on the fundamental concept of respect for sovereign nations and their right to regulate conduct within their own borders, as well as on the assumption that Congress is concerned primarily with domestic conditions.

Nowhere does the presumption against the extraterritorial application of U.S. law apply with greater force than in the areas of employment and labor law, traditionally matters of local concern and prerogative. In such cases, this Court has always found that Congress must clearly and affirmatively express its purpose to abandon strict notions of territoriality. It did not do so in Title VII.

B. The requisite clear expression of affirmative intent necessary to overcome the presumption against extraterritoriality cannot be found in Title VII's definition of "commerce." Unlike a variety of other statutes, Title VII's definitions of "commerce" and "industry affecting commerce" make no mention of "commerce with foreign nations," "foreign countries" or "foreign commerce." Indeed, language present in the bill first considered by the House of Representatives (H.R. 405) contained the terms "foreign commerce" and "foreign nations," but those terms were deleted by the Senate before the Civil Rights Act of 1964 was passed. Passage of the Senate version

is inconsistent with the notion of a clearly expressed congressional intent to apply Title VII extraterritorially.

Even statutes that do contain broad language expressly referring to "foreign countries," "foreign nations" or "foreign commerce" have been held by this Court not to reflect a congressional intent that they apply extraterritorially. Furthermore, Title VII defines "an industry affecting commerce" and "affecting commerce" by reference to both the Labor-Management Reporting and Disclosure Act of 1959 and the National Labor Relations Act. Before Congress chose to model Title VII on these provisions, this Court had expressly held that neither statute has extraterritorial application.

C. The EEOC argues that the alien exemption provision of Title VII manifests an intention by Congress to protect U.S. citizens with respect to their employment outside the United States. The alien exemption provision, however, says nothing about the application of Title VII to U.S. employers, U.S. employees or U.S. nationals in workplaces in foreign nations. The negative inference the EEOC asks the Court to draw from the provision does not constitute the clear and affirmative expression required to find that Congress intended Title VII to apply extraterritorially.

The history of the alien exemption provision demonstrates that its dual purposes were to exempt employers of aliens from coverage in U.S. "possessions" and to confirm the coverage of aliens in the United States. The alien exemption provision derives from the proposed 1949 Fair Employment Practices ("FEP") Act, and reflects the efforts by Congress to address the effects of this Court's 5-4 decision in *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377 (1948). There the Court held that the term "possession" in the Fair Labor Standards Act ("FLSA") included leased bases in foreign nations that were within the control of the United States. The FEP bills redefined "possessions" and included the first alien exemption provision

in order to circumvent the implications of *Vermilya-Brown*. Read together, the definitions of "possession" and the alien exemption provisions were intended to exempt employers of aliens on military bases and leased areas that were subject to U.S. jurisdiction.

In view of the history of the alien exemption provision and the restrictions on employment opportunities for aliens within the United States after World War II, the alien exemption provision also was a meaningful and useful way to confirm the intent of Congress to provide protection to aliens within the United States. *See Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86, 95 (1973).

D. Title VII as a whole has a domestic focus, with numerous references to states and state proceedings but no references to foreign countries or foreign proceedings. Congress carefully provided requirements that the EEOC accord substantial weight to findings of state or local authorities in proceedings under state or local law, gave a large degree of deference to state and local procedures, and took pains not to override the laws of the various states that were consistent with Title VII. If Title VII were intended to apply to employers in foreign workplaces, Congress also would have included parallel provisions addressing the sensitive areas of conflicts with and deference to foreign laws and procedures. The absence of any such provisions indicates that Congress never considered the matter.

E. While the international community may share the *goal* of eliminating discrimination in employment and many countries are parties to conventions dealing with employment discrimination, that does not support unilaterally imposing Title VII on foreign workplaces. Congress could not have intended to impose U.S. substantive and procedural law on the many nations that have adopted laws of their own or that have ratified treaties and conventions dealing with employment discrimination, such as ILO Convention No. 111, cited by one of the amici.

Saudi Arab law regulates all employment within its borders, and provides a procedural framework for vindication of rights under the law for citizens and non-citizens of Saudi Arabia alike. Under established principles of international law, the United States should not seek to impose its law on Saudi Arabia and on the 110 other countries that have ratified ILO Convention No. 111. The Diplomatic Notes sent to the U.S. Department of State by the Governments of Canada, Australia and the United Kingdom with respect to this case further support this view.

II. No deference should be given to the EEOC's interpretation of Title VII because it is not supported by the statute or the legislative history, was not announced contemporaneously with the enactment of Title VII, and has been far from consistent in the 26 years since enactment of Title VII. It was not until 1988, 24 years after the passage of Title VII, that the EEOC articulated any policy guidance on what it now asserts is the clear intent of Congress to reach U.S. employers of U.S. citizens abroad.

III. Only Congress should decide whether it is good policy to apply Title VII to workplaces overseas, and it has not yet done so. The courts below therefore properly declined to make the policy choices that are assigned to Congress, and this Court should do the same.

ARGUMENT

I. CONGRESS DID NOT INTEND TO EXTEND TITLE VII TO WORKPLACES OVERSEAS TO REGULATE THE PRACTICES OF A U.S. EMPLOYER OF A U.S. CITIZEN IN A FOREIGN COUNTRY.

There is much common ground between the positions of the EEOC and Respondents in this case. We agree that the issue before the Court is "exclusively one of statutory interpretation" and not one of policy (EEOC Br. 8); policy matters are for the Congress and not for the

courts.[3] We also agree that Congress has the power to legislate extraterritorially and does on occasion regulate the actions of U.S. citizens outside U.S. territory. *Id.* at 8-9. The EEOC and Respondents agree, too, that Congress presumptively intends its acts to apply only within U.S. territory, absent a clear statement of intent to the contrary, and that this presumption applies in this case. EEOC Br. 9. We further agree that the established presumption against extraterritoriality is based on the recognition that Congress is concerned primarily with domestic conditions and does not create needless and unintended conflicts between our laws and policies and those of other nations. *Id.*

With this common ground established, the question "remains one of legislative intent" (EEOC Br. 9): Did Congress in 1964 intend to apply the employment discrimination provisions of the Civil Rights Act to regulate the practices of U.S. employers of U.S. citizens in workplaces overseas? Was any such intention expressed clearly and affirmatively to overcome the presumption against extraterritorial application of U.S. laws recognized and applied repeatedly by this Court?

The most candid answer is that Congress simply gave no thought to the extraterritorial application of Title VII, and therefore did not manifest in Title VII a clear and

[3] "EEOC Br." refers to the brief on the merits filed by the Solicitor General on behalf of the EEOC. "EEOC Pet." refers to the EEOC's Petition for Certiorari, and "EEOC Reply Br." refers to the EEOC's brief filed in reply to Aramco's Opposition to the Petition for Certiorari. "Boureslan Br." refers to the brief on the merits filed by Petitioner Ali Boureslan, and "Boureslan Pet." refers to his Petition for Certiorari.

"Lawyers Comm. Br." refers to the brief filed by The Lawyers Committee for Civil Rights Under Law as Amicus Curiae. "Int'l Human Rights Br." refers to the brief filed by The International Human Rights Law Group as Amicus Curiae. "ACLU Br." refers to the brief filed by the American Civil Liberties Union and other amici. "LDF Br." refers to the brief filed by the NAACP Legal Defense and Educational Fund, Inc. and other amici.

affirmative intent to apply it overseas. The passage of the Civil Rights Act of 1964 was the culmination of a 20-year struggle to forge a coalition of Senators and Congressmen sufficiently broad to enact a bill to eradicate discrimination within our own borders. Congress finally was able to accomplish that goal in 1964. *See generally* C. Whalen & B. Whalen, *The Longest Debate: A Legislative History of the 1964 Civil Rights Act* (1985).

In the extensive legislative history of Title VII, there is no evidence that Congress thought about and chose to address employment discrimination in foreign workplaces. To argue that Congress actually intended that Title VII apply beyond our borders, and that the definition of "commerce" in the Act or a negative inference drawn from the "alien exemption provision," either separately or in combination, constitutes a clear expression by Congress of such an intent, is little more than a "retrospective expansion of meaning." *Addision* v. *Holly Hill Fruit Prods. Co.*, 322 U.S. 607, 618 (1949).

As Judge Posner has written in a related context: "[L]ively debate would probably have ensued in Congress if anyone had thought that the new law might be applied to employees living and working in foreign countries. There was no such debate . . . ." *Pfeiffer* v. *Wm. Wrigley, Jr. Co.*, 755 F.2d 554, 559 (7th Cir. 1985) (rejecting arguments for the extraterritorial application of the ADEA, passed three years after Title VII). Since Congress "encounters difficulty enough in resolving points actually in dispute," given its silence on this issue in the debates on Title VII there is "no basis for thinking" that Congress in 1964 intended to apply Title VII to employers of U.S. citizens living and working in foreign workplaces. *See Pfeiffer* v. *Wm. Wrigley, Jr. Co.*, 755 F.2d at 559.

A. Acts Of Congress Are Presumed To Apply Only Within The Territory Of The United States Unless Congress Clearly And Affirmatively Expresses A Contrary Intent.

Firmly established in decisions of this Court and acknowledged by the EEOC and Respondents alike is the strong presumption that applies here, that legislation of Congress is meant to apply only within the territorial jurisdiction of the United States unless Congress makes clear that it applies beyond our borders. *See, e.g., Argentine Republic* v. *Amerada Hess Shipping Co.*, 109 S.Ct. 683, 691 (1989); *Foley Bros., Inc.* v. *Filardo*, 336 U.S. 281, 285 (1949); *Blackmer* v. *United States*, 284 U.S. 421, 437 (1932). The presumption is based on the fundamental concept of sovereignty, that nations have the right to regulate conduct within their own borders and not within the borders of another sovereign. *Sandberg* v. *McDonald*, 248 U.S. 185, 195 (1918) ("Legislation is presumptively territorial and confined to limits over which the law-making power has jurisdiction"). It also is "based on the assumption that Congress is primarily concerned with domestic conditions." *Foley Bros., Inc.* v. *Filardo*, 336 U.S. at 285.

In applying the presumption against extraterritorial application of U.S. laws, this Court has required more than an implication drawn from a negative inference or from the supposed breadth of a statute's jurisdictional provisions. It has required a clear statement affirmatively expressed by Congress that the coverage of a statute is intended to extend outside the territorial boundaries of the United States. *Argentine Republic* v. *Amerada Hess Shipping Co.*, 109 S. Ct. at 691; *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 18-20 (1963); *Foley Bros., Inc.* v. *Filardo*, 336 U.S. at 285-86, 291; *Sandberg* v. *McDonald*, 248 U.S. at 195.

If Congress intends a statute to apply beyond the borders of the United States, "[i]t is natural for Congress to say so in the statute, and failure to do so will

negative the purpose of Congress in this regard." *United States* v. *Bowman*, 260 U.S. 94, 98 (1922). Provision for extraterritorial application must be "specifically made in the statute," for if Congress intends such extraterritorial application "a few words would . . . stat[e] that intention, not leaving such an important regulation to be gathered from implication." *Sandberg v. McDonald*, 248 U.S. at 195. As the Court said in its most recent application of this requirement: "When it desires to do so, Congress knows how to place the high seas within the jurisdictional reach of a statute." *Argentine Republic* v. *Amerada Hess Shipping Co.*, 109 S. Ct. at 691.

In a challenge to these principles, the EEOC and several amici argue that Title VII applies extraterritorially here because this is a case where both the employer and the employee are U.S. nationals. EEOC Br. 7, 29; Lawyers Comm. Br. 25-26; Int'l Human Rights Br. 31-34; ACLU Br. 25-26. As even the dissent below recognized, however, "[t]erritoriality is considered the normal, and nationality an exceptional basis for the exercise of jurisdiction." Pet. App. 44a n.2 (quoting Restatement (Third) § 402 comment b). Apart from the tax laws and certain laws relating to national security and matters of war and peace —the treason statute, the selective service law, the Logan Act and the Trading With the Enemy Act—the United States rarely has applied its laws to individuals residing abroad on the basis of their United States nationality. Restatement (Third) § 402 reporters' note 1.[4] *See also infra* p. 24 n.18.

Furthermore, the presumption against extraterritorial application and the requirement of a clear and affirmative expression of congressional intent to extend U.S. laws outside the territorial boundaries of the United States are as stringent where nationality is the basis for jurisdiction as in other contexts. Thus, when Congress chooses to legislate extraterritorially based on nationality it regularly

[4] The 1984 amendments to the ADEA were an exception to this general principle, as was the foreign subpoena law at issue in *Blackmer* v. *United States*, 284 U.S. 421 (1932), but Congress in both cases spoke clearly, expressly and affirmatively as to its intent.

uses quite explicit statutory language.[5] Neither the definitional provisions nor the alien exemption provision of Title VII makes reference to U.S. nationals or U.S. citizens. Nor does either apply by its terms only to nationals or citizens. Therefore neither can satisfy the requirement for a clear and affirmative expression of congressional intent to apply Title VII extraterritorially on the nationality principle.

Nowhere does the presumption against extraterritorial application of U.S. law apply with greater force than in the areas of employment and labor law, traditionally matters of local concern and prerogative. Restatement (Third) § 414 comment e. As the EEOC has conceded (EEOC Pet. 11), when faced with the question whether Congress intended to apply extraterritorially other statutes regulating the relationship between employer and employee, this Court has uniformly found that Congress must express its purpose to abandon strict notions of territoriality clearly and affirmatively. *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. at 22; *Benz* v. *Compania Naviera Hidalgo*, 353 U.S. 138, 147 (1957); *Foley Bros., Inc.* v. *Filardo*, 336 U.S. at 285.

The Court said in *Foley*:

> The canon of [statutory] construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States . . . is a valid approach whereby unexpressed congressional intent may be ascertained. It is based on the assumption that Congress is primarily concerned with domestic conditions. . . . An intention . . . to regulate labor conditions which are the primary concern of a foreign country should not be attributed to Congress in the absence of a clearly expressed purpose.

336 U.S. at 285-86. As the Court later stated in *Benz*:

> [S]uch a "sweeping provision" as to foreign applicability was not specified in the Act. . . . For us to run interference in such a delicate field of international relations there must be present the *affirmative* intention of the Congress clearly expressed.

353 U.S. at 146-47 (emphasis added). This identical language was used in *McCulloch*. 372 U.S. at 22.[6]

The importance of such a clear and affirmative statement of congressional intent has been underscored by this Court in other areas as well. Recently, in considering whether Congress intended to subject a state to liability under 42 U.S.C. § 1983, the Court stated: "In traditionally sensitive areas," such as federal-state relations, "the requirement of clear statement [by Congress] assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Will* v. *Michigan Dept. of State*

[5] *See, e.g.*, the Comprehensive Anti-Apartheid Act of 1986, 22 U.S.C. § 5001 (defining "national of the United States"); the Export Administration Act of 1979, 50 U.S.C. app. § 2415(2) (defining "United States person"); the Logan Act, 18 U.S.C. § 953 ("Any citizen of the United States, wherever he may be . . ."); the ADEA, 29 U.S.C. § 630(f) ("The term 'employee' includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.").

[6] The EEOC argues that *Benz*, *McCulloch* and *Foley* are distinguishable because those cases turned on the issue of the application of U.S. law to aliens in foreign territory. EEOC Br. 17-18. In *Benz*, the ships and crew, while alien, were in the territorial waters of the United States, *Benz* v. *Compania Naviera Hidalgo*, 353 U.S. at 139, and in *McCulloch* the Honduran ships were owned by a company controlled by a U.S. company that time chartered the vessels and dictated their ports of call, vessels and sailings. *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. at 13-14. Both *Benz* and *McCulloch* relied on *Foley*, which concerned the application of U.S. law to U.S. citizens in foreign territory that was in no way part of the United States. *Foley Bros., Inc.* v. *Filardo*, 336 U.S. at 285 ("There is nothing brought to our attention indicating that the United States had been granted by the respective sovereignties any authority, legislative or otherwise, over the labor laws or customs of Iran or Iraq.") While *Foley* noted that the absence of a distinction between aliens and citizens "buttresses our conclusion" (*id.* at 286), the Court applied the presumption to reach its holding that the U.S. law at issue did not clearly manifest congressional intent that it apply to U.S. citizens in a foreign workplace.

Police, 109 S. Ct. 2304, 2308-09 (1989) (quoting *United States* v. *Bass*, 404 U.S. 336, 349 (1971)).[7]

B. The Requisite Clear Expression Of Affirmative Intent Necessary To Overcome The Presumption Against Extraterritoriality Cannot Be Found In Title VII's Definition of "Commerce".

Title VII of the Civil Rights Act of 1964 applies to employers, who are defined to include any "person" who employs 15 or more employees for a specified period and is "engaged in an industry affecting commerce." 42 U.S.C. § 2000e(b). "Industry affecting commerce" is defined in relation to the meaning of "affecting commerce" in the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401 *et seq.* 42 U.S.C. § 2000e(h). "Commerce" is defined as 'trade, traffic, commerce, transporation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof." 42 U.S.C. § 2000e(g).

Characterizing these provisions as ones that cover "both interstate and foreign commerce" (EEOC Br. 12), the EEOC argues that Title VII therefore reaches "employment discrimination occurring outside the United States." *Id.* Ignoring the presumption that legislation is limited to the territorial jurisdiction of the United States, the EEOC attempts to shift the focus from the persons covered by Title VII ("employer" in an "industry affecting commerce") to conduct ("discriminatory employment practices") and thereby broaden the jurisdictional provisions. EEOC Br. 11-12. But neither this effort, the jurisdictional provisions themselves (which

[7] *See also NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 506-07 (1979) (absence of affirmative intention in the statutory language to bring teachers in church-operated schools within the jurisdiction of NLRB means that Congress did not contemplate extending that Act to sensitive areas of First Amendment Religion Clauses).

are not as broad as the EEOC suggests) nor the alien exemption provision provides the clear and affirmative expression of congressional intent necessary to overcome the presumption against extraterritorial application of Title VII.

1. *Title VII's Definition Of "Commerce" By Its Terms Does Not Reach Overseas Workplaces.*

The Constitution gives Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, sec. 8. While Congress has broad power coextensive with the language of the Commerce Clause, Congress does not exercise the full extent of that power in every statute it writes.[8] If the language used by Congress in the jurisdictional provisions of a statute is limited to less than "all commerce which may lawfully be regulated by Congress," the reach of the statute necessarily is circumscribed. As Professor Tribe has concluded: "A law will not be held to affect all the activities Congress in theory can control unless statutory language or legislative history constitutes a *clear statement* that Congress intended to exercise its commerce power in full." L. Tribe, *American Constitutional Law* 316 (2d ed. 1988) (emphasis in original); *see Polish Nat'l Alliance* v. *NLRB*, 322 U.S. 643, 647 (1944).

Unlike a variety of other statutes,[9] Title VII's definitions of "commerce" and "industry affecting commerce"

[8] While Congress's power under the Commerce Clause is "plenary," *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 193-94 (1824) (Marshall, J.), its power to regulate every species of commercial intercourse has limitations. *Hodel* v. *Virginia Surface Mining Reclamation Ass'n*, 452 U.S. 264, 310-11 (1981) (Rehnquist, J., concurring) ("it would be a mistake to conclude that Congress' power to regulate pursuant to the Commerce Clause is unlimited . . . the connection with interstate commerce is itself a jurisdictional prerequisite for any substantive legislation by Congress under the Commerce Clause"). *See* L. Tribe, *American Constitutional Law* 314 (2d ed. 1988).

[9] *See, e.g.*, Federal Employees Liability Act, 45 U.S.C. § 51 ("any foreign nation", "foreign commerce"); National Labor Relations

make no mention of "commerce with foreign nations". *See* 42 U.S.C. § 2000e(g). Even within the Civil Rights Act of 1964 itself, Title II (governing public accommodations) has "commerce" language that refers expressly to foreign countries.[10] There is no such language in Title VII. Thus, the "commerce" provision of Title II is not parallel to the definition of "commerce" in Title VII. *Cf.* Lawyers Comm. Br. 10. Even if Title II and Title VII were parallel, however, Title II has never been held to reach a parallel suitation to the one in this case, *i.e.*, the regulation of a place of public accommodation owned by a U.S. citizen that is operated exclusively in a foreign country.

H.R. 405, cited by the EEOC as a bill incorporated into Title VII (EEOC Br. 16 n.9), originally set forth, as to the intent of Congress, certain findings and declarations that specifically referred to "foreign commerce" and "foreign nations."[11] Before the Civil Rights Act was

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Act, 29 U.S.C. § 151-52 ("any foreign country"); Railway Labor Act, 45 U.S.C. § 151 ("any foreign nation").

[10] Title II defines "commerce" as that "among the several States, . . . *or between any foreign country* or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State . . . *or a foreign country*." 42 U.S.C. § 2000a(c) (emphasis added).

[11] Sec. 2 of H.R. 405 (later part of Section 701 of Title VII of H.R. 7152) read in part as follows:

> Sec. 2. (a) The Congress hereby finds that, despite the continuing progress of our Nation, the practice of discriminating in employment against properly qualified persons because of their race, religion, color, national origin, or ancestry . . . adversely affects the domestic and *foreign commerce* of the United States.
>
> * * * *
>
> (c) The Congress further declares that the succeeding provisions of this Act are necessary for the following purposes:
>
> (1) To remove obstructions to the free flow of commerce among the States and *with foreign nations*.
>
> (2) To insure the complete and full enjoyment by all persons of the rights, privileges, and immunities secured and protected by the Constitution of the United States.

H.R. 405, 88th Cong., 1st Sess. 3 (1963) (emphasis added).

passed by the Senate, however, the "foreign commerce" and "foreign nations" language was deleted. The Senate version of H.R. 7152 was then acceded to by the House. 110 Cong. Rec. 15,897 (1964).

On June 5, 1964, in anticipation of debate on the Senate's substitute bill, the Dirksen-Mansfield Amendment (Amendment No. 656), Senator Dirksen inserted into the Congressional Record an annotated copy of the House bill that reflected the deletion by Senator Dirksen and others of the "foreign commerce" and "foreign nations" language. 110 Cong. Rec. 12,811-817 (1964) (Sen. Dirksen). The Civil Rights Act was passed by the Senate on June 17 and by the House on July 2 *without* the "foreign commerce" and "foreign nations" language. Pub. L. No. 88-352, 78 Stat. 241 (1964). *See* EEOC, *Legislative History of Titles VII and XI of Civil Rights Act of 1964* (1968). There is no explanation in the publicly available legislative history for these deletions, which are inconsistent with the notion of a clearly expressed intent to apply Title VII extraterritorially.

The legislative history of Title VII as passed reflects a consideration of Congress's power under the Commerce Clause, but that consideration was exclusively in terms of interstate and not foreign commerce. While there are suggestions that Congress intended to reach the full extent of its power to regulate commerce *among the states*, there is no mention of its power to regulate in connection with foreign commerce:

> "Commerce" is, generally speaking, interstate commerce, but includes commerce within U.S. possessions and the District of Columbia. It is, in short,

> that commerce to which the regulatory power of Congress extends under the Constitution, a familiar concept which has been employed in other statutes.

Interpretative Memorandum on Title VII, 110 Cong. Rec. 7212 (1964).[12] Thus, the passage of the Senate version of Title VII in lieu of the earlier House version is inconsistent with the notion of a clearly expressed congressional intent to apply Title VII extraterritorially.

Even statutes that contain broad language in their definitions of "commerce" that expressly refer to "foreign country," "foreign nation" or "foreign commerce" have been held not to reflect a congressional intent that they apply extraterritorially. For example, the Federal Employers Liability Act ("FELA"), 45 U.S.C. § 51, declares that every common carrier by railroad while engaging in interstate "or foreign commerce" shall be liable in damages to its employees who suffer injuries while employed by such carrier in commerce. It refers by its terms to "any foreign nation or nations." *Id.* This Court in *New York Central* v. *Chisholm*, 268 U.S. 29 (1925), nevertheless held that there was no jurisdiction under FELA for a damages action where a U.S. citizen employed on a U.S. railroad suffered fatal injuries at a

[12] The legislative history emphasizes Title VII's concern with national, and not foreign, application. *See, e.g.*, S. Rep. 867, 88th Cong., 2d Sess. 8 (1964) (concerning "goal of eliminating racial and religious barriers from the American labor market"); H.R. Rep. 570, 88th Cong., 1st Sess. 2 (1963) (job discrimination "permeates the national social fabric—North, South, East, and West"; H.R. 405 "is directed at correcting such abuses wherever found and is not focused upon any single section of the country."). H.R. Rep. No. 570, the report accompanying H.R. 405, cited by the EEOC (EEOC Br. 16), discusses the "international implications" of its provisions only in terms of the U.S. image abroad as a result of its actions at home: "Each [discrimination] incident pointing up our deficiencies in extending to all of our citizens full and equal rights and opportunities casts doubt upon our sincerity and motives in the international sphere." H.R. Rep. 570, 88th Cong., 1st Sess. 3 (1963).

point thirty miles north of the New York-Canadian border. 268 U.S. at 31-32.[13]

The dissent in the present case therefore expressly did not rely on the definitions of "commerce" and "industry affecting commerce" in Title VII as a basis for extraterritorial application of Title VII. Pet. App. 18a. Rather, it characterized them as "traditional Commerce Clause language" that serves merely as "a 'nexus' requirement, providing a basis for Congress's exercise of power under the Commerce Clause." *Id.*[14]

The EEOC, by contrast, now characterizes that jurisdictional language as an affirmative, clear statement of congressional intent to extend Title VII's coverage to "employment discrimination occurring outside the United States." EEOC Br. 12. Only one of the cases cited to support this assertion, however, reached into foreign ter-

[13] Similarly, despite the reference in the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*, as amended to cover air carriers, 45 U.S.C. § 181 *et seq.*, to "foreign nations" in the Act's definition of "commerce," the Eighth Circuit held that the RLA did not apply to employees working in American airplanes wholly outside the United States. *Air Line Stewards & Stewardesses Ass'n, Int'l* v. *Northwest Airlines, Inc.*, 267 F.2d 170, 177-78 (8th Cir.), *cert. denied*, 361 U.S. 901 (1959); *accord Air Line Dispatchers Ass'n* v. *National Mediation Bd.*, 189 F.2d 685 (D.C. Cir.), *cert. denied*, 342 U.S. 849 (1951).

[14] Properly analyzed, the statutory phrase "between a State and any place outside thereof" in the definition of "commerce" in Title VII is a formulation used to provide the jurisdictional nexus required to regulate commerce that is not wholly within a single state, presumably as it affects both interstate and foreign commerce. But it does not provide any basis to regulate conduct exclusively *within* a foreign country.

Vermilya-Brown Co. v. *Connell*, 335 U.S. 377 (1948), cited by the EEOC as support for the notion that Congress can regulate acts of U.S. citizens wholly within the territory of foreign nations (EEOC Br. 8-9), is not on point. The decision there turned on the Court's finding that leased bases were within the sole control of the United States because they were included within the definition of "possession" in the Fair Labor Standards Act. 335 U.S. at 390.

ritory at all and then only because of direct economic effects in the United States,[15] and none of the cited cases involved conduct occurring exclusively on foreign soil.[16] Similarly, Title VII's definition of "commerce" does not evidence any congressional intent to regulate activities exclusively in other countries, let alone the clear expression of affirmative intent necessary to reach activities overseas.

2. *Title VII's Definition Of "Commerce" Was Derived From Statutes That This Court Had Previously Held Do Not Apply Extraterritorially.*

Title VII defines "employer" as "a person engaged in an industry affecting commerce," 42 U.S.C. § 2000e(b), and defines "an industry affecting commerce" by reference to the meaning of "affecting commerce" in the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 402(c). 42 U.S.C. § 2000e(h). That Act in turn defines "industry affecting commerce" as an industry included under the Labor Management Relations Act. This Court expressly has held that the Labor Management Relations Act does not have extraterritorial application. *Benz* v. *Compania Naviera Hidalgo*, 353 U.S. at 142-43, 146-47.

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[15] That case, *Steele* v. *Bulova Watch Co.*, 344 U.S. 280 (1952), is discussed *infra* 23-25.

[16] *Branch* v. *FTC*, 141 F.2d 31 (7th Cir. 1944), the only other case cited by the EEOC (EEOC Br. 12), involved a correspondence school conducted from Branch's home in Chicago and the distribution of correspondence courses by mail from Chicago to Latin American countries. 141 F.2d at 33. All of the cases cited by the Lawyers Committee (Lawyers Comm. Br. 10) are domestic in their focus: *Daniel* v. *Paul*, 395 U.S. 298 (1969) (an amusement park near Little Rock, Arkansas); *Katzenbach* v. *McClung*, 379 U.S. 294 (1964) (Ollie's Restaurant located in Birmingham, Alabama); *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241 (1964) (a motel in Georgia); *Polish Nat'l Alliance* v. *NLRB*, 322 U.S. 643 (1944) (a fraternal and cultural benefit society in the business of insurance, organized in over 1800 lodges in 27 states with weekly mailings all over the U.S.); *Wickard* v. *Filburn*, 317 U.S. 111 (1942) (a wheat farmer in Ohio).

The legislative history of Title VII also refers to the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151-168. Interpretative Memorandum on Title VII, 110 Cong. Rec. 7212 (1964) ("The term 'affecting commerce' is also familiar, since this is the standard of coverage employed in the National Labor Relations Act . . ."). Yet even though the NLRA, unlike Title VII, contained broad language that clearly referred by its terms to foreign commerce, 29 U.S.C. § 152(6), this Court refused to find a congressional intent to apply the NLRA extraterritorially because there was not "any specific language" in the Act reflecting congressional intent to do so. *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. at 19.

Despite the holdings of the Court in *Benz* and *McCulloch*, the EEOC relies on an assertedly "similar . . . broad jurisdictional grant in the Lanham Act" that this Court held applied extraterritorially in *Steele* v. *Bulova Watch Co.*, 344 U.S. at 286 (1952). EEOC Br. 12. The Lanham Act, however, also contained a clear statement of congressional intent to regulate the domestic effects within the United States resulting from the use of deceptive or misleading trademarks overseas and by its terms it reached "all commerce which may lawfully be regulated by Congress." In *Steele*, the Court relied both on that clear intent and that broad Commerce Clause language. *See* 344 U.S. at 283-84. The Lanham Act and *Steele* are inapposite in view of Title VII's more limited "commerce" language, its definitional provisions and its reliance on statutes that the Court held not to be subject to extraterritorial application.[17]

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[17] A large number of other statutes employ similar or identical "commerce" and "affecting commerce" language to that used in Title VII. *See, e.g.*, Consumer Product Safety Act, 15 U.S.C. § 2052(a)(12); Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 321(b); Noise Control Act of 1972, 42 U.S.C. § 4902(7); Radiation Control for Health and Safety Act of 1968, 42 U.S.C. § 263c(4); and Transportation Safety Act of 1974, 49 U.S.C. § 1802(1). The use of such language in these statutes does not evidence any affirma-

The EEOC's references to *Steele* also suggest that it may be asking this Court to ignore the territoriality principle and the presumption relied on by both the majority and the dissent in the court below in favor of a novel application of the so-called "effects principle," a less favored basis for the exercise of jurisdiction.[18] But the effects principle only provides a basis for the regulation of conduct abroad through legislation intended to reach such conduct when it substantially harms the domestic economy of the United States. *See Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 704-05 & n.13 (1961) (quoting *United States* v. *Sisal Sales Corp.*, 274 U.S. 274, 276 (1926)).

There are limits to the applicability of the effects principle, and the mere fact that conduct in a foreign country may have some repercussions in the United States is not sufficient to find effects substantial or direct

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tive intent by Congress to extend these statutes extraterritorially, and no court has held that any of these statutes so apply.

[18] The current version of the Restatement of Foreign Relations Law, published in 1986, emphasizes that "[t]he territorial principle is by far the most common basis for the exercise of jurisdiction to prescribe . . . ." Restatement (Third) § 402 comment c. The Restatement sets forth the bases for a state to prescribe jurisdiction in a hierarchical order: *first*, conduct within the state's own territory; *second*, the status of persons or interests present within its territory; *third*, conduct outside its territory that has "substantial effect" within its territory, and *fourth*, "the activities, interests, status or relations of its nationals outside as well as within its territory." Restatement (Third) § 402. (There is a fifth, non-traditional jurisdictional basis, recently added, relating to international terrorist activity.)

In addition, courts today continue to rely on the presumption against extraterritorial application set forth by this Court in *Foley Bros., Inc.* v. *Filardo*, 336 U.S. at 285. Thus, the failure of the Restatement (Third) to include section 38 of the Restatement (Second) of Foreign Relations Law *in haec verba* (U.S. statutes apply "only to conduct occurring within, or having effect within, the territory of the United States, unless the contrary is clearly indicated by the statute"), hardly supports the argument that territoriality is an outmoded concept under international law. *See* Lawyers Comm. Br. 5, 21.

enough to extend our laws extraterritorially. *Cf. United States* v. *Aluminum Co. of Am.*, 148 F.2d 416, 443-44 (2d Cir. 1945) (L. Hand, J.). Only conduct that has or is intended to have a direct and substantial economic effect within the United States is reached. *See* Restatement (Third) §§ 402(c), 416 comment a; *see also* § 402 comment d (discussing economic effects). Moreover, under the effects doctrine, as in other cases involving the extraterritorial application of U.S. law, the first step in the analysis remains whether Congress intended the statute to reach the conduct involved. *United States* v. *Aluminum Co. of Am.*, 148 F.2d at 443.

In cases decided on the basis of the effects principle, the United States (frequently with considerable controversy and opposition) has reached into foreign markets because the economic effect of violations of the antitrust, insider trading or securities laws in this country make territorial boundaries meaningless.[19] Application of Title VII extraterritorially, on the other hand, would reach into foreign workplaces on a day-to-day basis to impose U.S. laws, procedures and remedies on essentially local activities such as labor, health and safety practices. *See* Restatement (Third) § 414 comment c. This is an unwarranted extension of an already controversial doctrine into an area that traditionally has been recognized as being under local control.[20]

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[19] The effects doctrine has generated strong reactions from other countries in the form of diplomatic protest and the enactment of blocking statutes that place limits on compliance with the laws of another country. 1. J. Atwood & K. Brewster, *American Business Abroad* § 4.14-4.18 (2d ed. 1981 & Supp. 1990); D. Lange and G. Born, *The Extraterritorial Application of National Laws* 35 (1987); Gerber, *Beyond Balancing: International Law Restraints on the Reach of National Laws*, 10 Yale J. Int'l L., 185, 219-20 (1984). At least 16 nations have enacted such blocking statutes as "self-protection against the unilateral extraterritorial application of United States law." Rosenthal, *Jurisdictional Conflicts Between Sovereign Nations*, 19 Int'l Law. 487, 491 & n.22 (1985).

[20] The International Human Rights Law Group attempts to distinguish Title VII from labor statutes on the basis that it protects

C. The Requisite Clear Expression Of Affirmative Intent Necessary To Overcome The Presumption Against Extraterritoriality Cannot Be Found In The Negative Inference From The Alien Exemption Provision.

The EEOC argues that the alien exemption provision "clearly manifests an intention" by Congress to protect U.S. citizens with respect to their employment outside the United States and that there is "no other plausible explanation" for the presence of the alien exemption provision in Title VII. EEOC Br. 12. The alien exemption provision, however, says nothing about the coverage of U.S. employers, U.S. employees or U.S. nationals in workplaces in foreign nations, as would be required to provide for the application of Title VII to foreign workplaces, whether based upon U.S. nationality or upon traditional principles of extraterritorial jurisdiction. *See supra* 13-14. Furthermore, the alien exemption provision does have "plausible explanations" that make sense historically, textually and logically.

1. *The History Of The Alien Exemption Provision Demonstrates That Its Dual Purposes Were To Exempt Employers Of Aliens From Coverage In U.S. "Possessions" And To Confirm The Coverage Of Aliens In The United States.*

The EEOC's alien exemption argument would have the Court view Title VII as if it only applied to two geographic regions: inside any State, that is, within the

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against discrimination, an individual right. Int'l Human Rights Br. 26-28. The National Labor Relations Act, however, also protects employees against discrimination, on the grounds of union membership or non-membership. *See* 29 U.S.C. § 157 (guarantees individual employees the right to organize and form labor unions or to refrain); 29 U.S.C. § 158(a)(3) (unfair labor practice for employer to discriminate in order to encourage or discourage membership in union). Yet these individual protections do not apply to U.S. citizens in foreign countries. *See e.g., GTE Automatic Elec. Inc.*, 226 N.L.R.B. 1222 (1976) (citing *Benz* v. *Compania Naviera Hidalgo*, 353 U.S. 138 (1957)).

United States and the territories listed in the definition of "State" in the statute; and outside any State, or, as the EEOC repeatedly says "abroad"—a term found nowhere in the statute. In fact, however, the statute requires an examination of *three* distinct geographic regions: (1) inside any State, that is, within the United States and its many territories; (2) U.S. possessions, which also would include areas under the jurisdiction or sole control of the United States—an important and intended separate category when viewed against the historical derivation of the alien exemption provision; and (3) geographic regions outside any State or possession.

Aliens are included within the coverage of Title VII because they are "individuals" protected by the prohibitions against unfair employment practices in 42 U.S.C. § 2000e-2. The definition of "employer" includes all employers engaged in an industry affecting commerce, and the territory under the jurisdiction and control of the United States referred to in the definition of "commerce" includes "possessions" as well as "States" of the United States. 42 U.S.C. §§ 2000e(b), (g). The definition of "State," by contrast, covers certain territories but does not cover all possessions. 42 U.S.C. § 2000e(i). The alien exemption provides that Title VII does not extend to the employment of aliens "outside any State." Thus, employers of aliens in the possessions of the United States would be covered by Title VII but for the inclusion by Congress of the alien exemption provision that exempts them from coverage.

This reading of the alien exemption provision is consistent with and supported by the historical development of the provision. The first legislative use of an alien exemption provision was in the proposed 1949 Fair Employment Practices ("FEP") Act, H.R. 4453, governing the United States as employer and contractor.[21] The

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[21] The first FEP bills introduced contained exemptions for state and local governments, and for religious, charitable, and educa-

year before Congress considered H.R. 4453, this Court in *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377 (1948), had held that the term "possession" in the Fair Labor Stardards Act ("FLSA") included both the sovereign territory of the United States and leased bases in foreign nations that were within the sole control of the United States. Thus, the Court concluded, the protections of the FLSA extended to all individuals (including aliens) employed by private employers on U.S. leased bases in foreign nations. 335 U.S. at 390.

H.R. 4453, which covered government employers and government contractors as well as certain private employers, was one of the first FEP bills introduced after the *Vermilya-Brown* decision. Unlike previous FEP bills that included the phrase "State, Territory or possession" without definition in the legislation or accompanying committee reports, H.R. 4453 defined "possessions" to exclude "other places held by the United States by lease, under international arrangements or by military occupation." H.R. 4453, 81st Cong., 1st Sess., § 3(f) (1949). It also contained a new exemption provision that exempted from coverage "any employer with respect to the employment of aliens outside the continental United States, its territories and possessions." *Id.* § 4. H.R. 4453 thereby effectively circumvented the strained reasoning of the Court in *Vermilya-Brown*. *See* 335 U.S. at 390-409 (Jackson, J., dissenting).

Coverage of the federal government as an employer and the exemption provision for employers of aliens were retained in subsequent FEP bills introduced during the 1950's and early 1960's. The definition of "possession" continued to appear in many proposals for FEP legis-

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tional institutions, but made no reference to aliens by exemption or otherwise. *See, e.g.*, H.R. 2824, 80th Cong., 1st Sess. § 4 (1947). These bills used the phrase "State, Territory or possession" to denote their geographic scope. No definition of these terms was included in the proposed legislation, and the terms were not mentioned in hearings and reports. *See, e.g.*, H.R. Rep. No. 187, 79th Cong., 1st Sess. 2 (1945).

lation until 1962, when the term "State" was substituted for the phrase "State, Territory and possession" that appeared in earlier FEP bills. *See, e.g.*, H.R. 10,144, 87th Cong., 2d Sess. 10 (1962). "State" was defined in the same way as in the FLSA, which had been amended in 1957 for the express purpose of overruling *Vermilya-Brown* and thereby relieving employers of the potential liability created by that decision.[22] Read together, then, the definitions of "possession" and the alien exemption provisions in the FEP bills from 1949 until the early 1960's were intended to exempt employers of aliens on military bases and leased areas that, under the reasoning in *Vermilya-Brown*, were subject to U.S. jurisdiction.

In Title VII coverage of federal employees was deleted. The provision exempting employers of aliens, which had been inherited from numerous predecessor bills, nevertheless remained in Title VII. Because Title VII contained an expanded definition of the term "State," which listed the territories, but not possessions, to which Title VII extends, the purpose of the alien exemption provision remained the same: To continue to limit the impact of *Vermilya-Brown* by excluding from coverage employers of aliens in areas under U.S. control that did not meet the revised definition of "State." The congressional concern with exempting aliens employed within the possessions of the United States as a result of the *Vermilya-Brown* decision is a more likely reason for inclusion of an alien exemption provision in Title VII than the EEOC's explanation.

The EEOC argues that because the alien exemption first appeared in fair employment legislation six weeks after this Court's decision in *Foley*, "it was conceived as

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[22] Under the FLSA, "'State' means any State of the United States or the District of Columbia or any territory or possession of the United States." 29 U.S.C. § 203(c) (1978). The purpose of the 1957 amendment to the FLSA was "to exclude from any possible coverage work performed on United States bases in foreign countries." H.R. Rep. No. 1165, 85th Cong., 1st Sess. 1, 6 (1957).

a response to that decision." EEOC Br. 17. The legislative history of H.R. 4453 makes no mention whatsoever of *Foley*. But even assuming that the alien exemption provision was a response to the distinction between citizens and aliens raised in the *Foley* decision, the provision must be read in light of the geographic limitation contained in H.R. 4453. Congress would not have restricted the geographic scope of the legislation in the definitional provision and simultaneously extended it extraterritorially to U.S. citizens overseas through the alien exemption provision. It is even more illogical to assume that Congress would expressly have excluded from coverage military bases, leased areas and possessions, while silently including foreign countries over which the United States had no claim to jurisdiction, even under *Vermilya-Brown*.

There is another reason for the alien exemption provision, as the panel and *en banc* majorities in the court below noted. That explanation is found simply by reading the exemption consistently with this Court's decision in *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86 (1973). In *Espinoza*, the Court noted that aliens in the United States are protected from discrimination both because Title VII uses the term "individual" rather than "citizen" and because of the alien exemption provision. On these two bases, the Court stated in passing that "Title VII was clearly intended to apply with respect to the employment of aliens inside any State." 414 U.S. at 95.

The EEOC now agrees with Respondents that the *Espinoza* decision stands for the proposition that "the alien exemption does *confirm* Congress's intention to provide protection to aliens within the United States" (EEOC Br. 15), but it rejects the position of the majority below that the provision would remain a "meaningful and useful part of the Act" even if Title VII were interpreted not to apply abroad. EEOC Br. 4, 14-15.

A *confirmation* of congressional intent by itself may have been quite "meaningful and useful," if not essential, in 1949 when the alien exemption provision first

appeared. Aliens had been excluded from certain domestic protective labor legislation and restricted in their employment opportunities within the United States.[23] There was considerable debate in Congress as to whether aliens in the United States should be covered by the FEP legislation. It therefore is quite likely that the alien exemption provision was intended in 1949 as a "backhanded way" of extending coverage to aliens in the United States at a time when a more direct approach might not have been successful in the Congress. *See* Kirschner, *Extraterritorial Application of Title VII of the Civil Rights Act*, 34 Lab. L. J. 394, 399-400 & n.26 (1983).[24]

In legislatively reversing this Court's decision in *Vermilya-Brown* and leaving *Foley Bros.* intact, Congress indicated that the application of U.S. labor standards to overseas areas is contrary to the best interests of both the United States and the foreign areas, *see* Rep. No. 987, 85th Cong., 1st Sess. 2 (1957), precisely the view expressed by Justice Jackson in his dissent in *Vermilya-Brown*. To attribute to Congress in 1949 or in 1964 an intent to regulate employment conditions in areas outside the jurisdiction of the United States on the basis of

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[23] As late as 1949, Japanese, Chinese, Koreans, Filipinos, and other Asians were barred from United States citizenship. Racially restrictive immigration quotas prohibited most Asians from even entering the United States. *See* M.R. Konvitz, *The Alien and the Asiatic in American Law*, 171-211 (1946).

[24] Congressman Powell, the author of H.R. 4453, was concerned about discrimination against aliens, particularly in the Panama Canal Zone. *See Hearings on H.R. 4453 before Special Subcomm. on Education and Labor*, 81st Cong., 1st Sess. 361-62 (1949). In March 1949, Congress was considering a bill to revise or eliminate many racially restrictive immigration quotas. New York Times, Mar. 2, 1949, at 20, col. 5. During consideration of this bill, Congressman Powell fought to remove immigration quotas for natives of the British West Indies, offering an amendment to this effect. 95 Cong. Rec. 1682, 1688-1981 (1949). *See also* 92 Cong. Rec. 184 (1946); 92 Cong. Rec. 887 (1946); 96 Cong. Rec. 2175 (1950).

the alien exemption provision is to completely ignore the context in which it was formulated.[25]

2. *A Negative Inference Cannot Provide The Requisite Clear, Specific Congressional Expression Of Intent Necessary For The Extraterritorial Application Of A U.S. Law.*

The EEOC argues that a negative inference, combined with the asserted broad jurisdictional provisions of Title

[25] The EEOC cites only two pieces of legislative history in support of its alien exemption argument. It cites a House Report stating that the purpose of the alien exemption "is to remove conflicts of law which might otherwise exist between the United States and a foreign nation in the employment of aliens outside the United States by an American enterprise." H.R. Rep. No. 570, 88th Cong., 1st Sess. 4 (1963); *see* EEOC Br. 16, 25. It also cites S. 1937 and its accompanying report (S. Rep. No. 867, 88th Cong., 2d Sess. (1964)) as laying to rest "any doubt" about the meaning of the alien exemption provision. EEOC Br. 17.

The House Report was written to accompany H.R. 405 by the House Labor Committee, not the House Judiciary Committee, and H.R. 405 was not the bill ultimately enacted by Congress. The language of H.R. 405 also included references to "foreign commerce" and "foreign nations" that were deleted later. *See supra* 18-20. As the panel majority noted, the impact of this sentence is further diluted by the indirect nature of the subcommittee's role in developing the legislation that became Title VII: "In short, the EEOC looks for a clear expression of intention in a negative inference arising from one paragraph of a report rendered by members of a House subcommittee that did not participate in voting the bill out of the Judiciary Committee and sending it to the full House." Pet. App. 40a-41a n.4.

S. 1937 differed substantially from Title VII as passed because it also covered government employees and government contractors regardless of their location. S. Rep. No. 867, 88th Cong., 2d Sess. 23. (1964). Thus, the alien exemption provision would have related to such employees, particularly to government contractors in overseas possessions. Moreover, the report accompanying S. 1937 explained the exemption not as an exemption of employers from coverage only in respect of the employment of aliens, but as an exemption of "U.S. employers employing citizens of foreign countries in foreign lands" (*id.* at 11), which appears to suggest that all U.S. employers who employed even a single foreign citizen in a foreign country would be exempt from coverage.

VII, was an "entirely natural" way for Congress in 1964 to express its intent to overcome the presumption against extraterritorial application. EEOC Br. 15. Congress, however, would not have left "such an important and unusual regulation [of employment in foreign nations] to be gathered from implication." *Sandberg* v. *McDonald*, 248 U.S. at 195. At the time Congress was considering Title VII in 1964, this Court had just decided *McCulloch*, in which it said that for an act of Congress to apply outside the borders of the United States, "there must be present the affirmative intention of Congress clearly expressed." *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. at 21-22. Thus, if Congress had intended Title VII to apply in foreign workplaces it would have said so clearly, expressly and affirmatively.[26]

The district court decisions cited by the EEOC and amici to support the negative inference argument (EEOC Br. 14) are neither persuasive nor uniform in their holdings. Contrary to the EEOC's assertion, not all the "judicial decisions" but this one (*id.*) that have considered this issue have found that Title VII applies extraterritorially. *See EEOC* v. *Kloster Cruise Ltd.*, 53 Fair Emp. Prac. Cas. (BNA) 1229 (S.D. Fla. 1990).

Of those courts that have found extraterritorial application, all rely on *Bryant* v. *Int'l Schools Servs., Inc.* 502 F. Supp. 472 (D.N.J. 1980), *rev'd on other grounds*, 675 F.2d 562 (3d Cir. 1982), which based its reasoning on

[26] Congress certainly was aware of the need for a clear expression of intent at the time Title VII was being considered. Right after the *McCulloch* decision, the House and Senate Judiciary Committees considered and approved H.R. 9435, a bill to improve discovery procedures in international litigation. In its report, the Senate Judiciary Committee recognized the need to express clearly any intent to apply statutes extraterritorially: "Without the proposed amendment, section 1621 leaves in doubt whether it has extraterritorial applications . . . It is considered desirable to make unambiguously clear that the section applies irrespective of whether the perjury is committed in the United States or in a foreign country. . . ." S. Rep. 1580, 80th Cong., 2d Sess. 2 (1964).

dicta in a footnote in *Love* v. *Pullman Co.*, 13 Fair Emp. Prac. Cas. (BNA) 423, 426 n.4 (D. Colo. 1976), *aff'd on other grounds*, 569 F.2d 1074 (10th Cir. 1978).[27] *Bryant* was reversed on appeal, however, and the Third Circuit expressly declined to reach the question of Title VII's extraterritorial application. *Bryant* v. *Int'l. Schools Servs., Inc.*, 675 F.2d at 577 n.23. The Third Circuit later expressed doubt about the propriety of the negative inference rationale in *Cleary* v. *United States Lines, Inc.*, 728 F.2d 607, 609 (3d Cir. 1984).[28]

D. Extraterritorial Application Of Title VII Would Be Inconsistent With Its Structure And Would Necessarily Result In Coverage Of Foreign As Well As U.S. Employers In Foreign Workplaces.

The absence of congressional intent to apply Title VII extraterritorially is reflected in other provisions of Title VII. The statute as a whole indicates a domestic focus, with numerous references to states and state proceedings but no references whatsoever to foreign countries or foreign proceedings. *See, e.g.*, 42 U.S.C §§ 2000e-5, 2000e-7.

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[27] *See also Akgun* v. *Boeing Co.*, No. C89-1319D (W.D. Wash. June 7, 1990); *Seville* v. *Martin Marietta Corp.*, 638 F. Supp. 590 (D. Md. 1986).

[28] The EEOC claims that *Pennsylvania* v. *Union Gas Co.*, 109 S. Ct. 2273 (1990), supports its position that a negative inference from an exemption provision is an adequate basis from which to find a manifestation of congressional intent. EEOC Br. 12-13. The *Union Gas* case, however, involved a statutory provision that had a clear affirmative expression of intent *in addition to* the negative inference to be drawn from an exemption. In concluding that the statute "clearly evinces an intent to hold States liable in damages in federal court," the Court in *Union Gas* relied on "[t]he express inclusion of States within the statute's definition of persons and the plain statement that States are to be considered 'owners or operators' in all but very narrow circumstances, [which] together convey a message of unmistakable clarity: Congress intended that states be liable along with everyone else for cleanup costs recoverable under CERCLA." *Pennsylvania* v. *Union Gas*, 109 S. Ct. at 2278, 2280. Thus, it was not a negative inference from an exemption that led to the Court's conclusion in *Union Gas* but a combination of factors—particularly the express coverage provisions.

The EEOC attempts to justify, explain away or ignore these inconsistencies, which serves only to underline the difficulty with its position: If Congress had in fact intended to apply Title VII in foreign workplaces it would have addressed the problems raised by doing so in the language of Title VII, as it addressed similar problems concerning the states.

For example, Title VII and its legislative history reflect congressional concern with resolving conflicts between the federal law and procedures created by Title VII and the law and procedures of the states regulating fair employment practices. Section 2000h-4 provides that Title VII should not be construed to exclude the operation of state law or invalidate any state law unless inconsistent with the purposes of the Act. 42 U.S.C. 2000h-4. Section 2000e-5 requires the EEOC to "accord substantial weight" to findings of state or local authorities in proceedings under state or local law, and requires certain deference to state and local procedures. 42 U.S.C. § 2000e-5. Section 2000e-7 states that nothing in Title VII shall affect the application of state or local law unless such law requires or permits practices that would be unlawful under Title VII. 42 U.S.C. § 2000e-7.

If Title VII were intended to apply to employers in foreign workplaces, Congress would have included parallel provisions addressing the sensitive area of conflicts with foreign laws and procedures. The EEOC reasons, however, that foreign procedures and laws were "unfamiliar" to Congress in 1964 and it therefore chose not to deal with them in the same careful way it dealt with state law and procedures. EEOC Br. 30. This speculative suggestion about why Congress was silent attributes to Congress an unjustifiable lack of capacity. Congress's failure to act was not because of its supposed lack of familiarity with foreign laws and procedures but because Congress never considered the extraterritorial application of Title VII at all.[29]

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[29] The EEOC argues that the alien exemption provision is the congressional resolution of the conflicts of law that arise from

Furthermore, the EEOC's suggestion contrasts sharply with the careful consideration Congress gave to such matters in 1984 when, in amending the Age Discrimination in Employment Act, it specifically provided for potential conflicts with foreign law, first by limiting the employers to whom the ADEA would apply abroad and then by expressly addressing conflicts: "[I]t shall not be unlawful for an employer . . . to take any action otherwise prohibited . . . where such practices involve an employee in a workplace in a foreign country, and compliance with [the ADEA] would cause such employer . . . to violate the laws of the country in which such workplace is located[.]" 29 U.S.C. § 623(f).[30]

The absence of any similar statement concerning conflicts with foreign laws and procedures in either the statute or the legislative history of Title VII is especially peculiar in view of the EEOC's position that the statute extraterritorial application of Title VII. EEOC Br. 16-18. That supposed resolution, however, fails to address, much less resolve, the many significant conflicts that would arise in foreign workplaces where the law of the country in which the workplace is located applies to citizens and non-citizens alike, as is the case in Saudi Arabia. Even accepting the EEOC's interpretation of its meaning, the alien exemption provision addresses only conflicts that would arise in the application of Title VII to foreign citizens in foreign workplaces.

[30] If the EEOC is suggesting that the Bona Fide Occupational Qualification ("BFOQ") defense, 42 U.S.C. 2000e-2(e), is an adequate substitute for such specific provisions (EEOC Br. 7, 27), suffice it to say that the BFOQ defense is an inadequate tool for minimizing conflicts of law because it is extremely narrow, applying only to religion, sex and national origin (not race) and only where distinctions on one of those bases is reasonably necessary to the normal operation of a particular business or enterprise. *See Dothard* v. *Rawlinson*, 433 U.S. 321, 333 (1976); *Kern* v. *Dynalectron Corp.*, 577 F. Supp. 1196 (N.D. Texas 1983), *aff'd*, 746 F.2d 810 (5th Cir. 1984). The BFOQ defense and defenses available under the ADEA referred to by the EEOC are uncertain in their availability and application under Title VII and thus are no substitute for a clearly stated provision on conflicts with the laws of foreign nations like those in the amended ADEA.

by its own terms applies even to foreign employers of U.S. citizens in foreign countries. There is no citizenship restriction in the definition of employer ("a person engaged in an industry affecting commerce") or in the definition of employee ("an individual employed by an employer"). As the EEOC has stated, an employer is subject to Title VII "if it has employed 15 or more employees for a specified period and is engaged in an industry affecting commerce." EEOC Br. 11, 28. Thus, if Title VII reaches the activities of U.S. employers of U.S. citizens in foreign workplaces, as the EEOC argues, it necessarily would reach the activities of foreign employers of U.S. citizens as well. *Cf. Andrus* v. *Glover Constr. Co.*, 446 U.S. 608, 616-617 (1980) (additional exemptions are not to be implied absent contrary legislative intent).

Although the EEOC in its brief reluctantly concedes that application to foreign employers presents "more difficult issues" (EEOC Br. 28), it suggests that the coverage of foreign employers could be read out of Title VII. The EEOC now suggests that Title VII "could be interpreted" to embody "accepted international limits on prescriptive jurisdiction" (*id.*), even though it concluded in a very recent policy guidance that Title VII "contains no exemption from coverage for foreign employers" and that therefore Congress must have intended to cover "some foreign employers." Policy Statement No. 88-15, EEOC Compl. Man. (CCH) ¶ 2187 at 2393 (1989).[31]

[31] The EEOC reasoned in its policy guidance:

> [T]he Act contains no exemption from coverage for foreign employers even though Congress wrote numerous exemptions in the original statute and its amendments. . . . it is necessary to construe § 702 as expressing a Congressional intent to extend the coverage of Title VII to American and some foreign employers.

Policy Statement No. 88-15, EEOC Compl. Man. (CCH) ¶ 2187, 2393 (1989). The EEOC has assumed for itself the task of attempting to determine which foreign employers will be covered under Title VII. It has said it will balance a number of factors

The problem is that neither the EEOC's argument in this Court nor its 1988 policy guidance has any basis in the statutory language. By reading the definition of "employer" to mean only "American employer" by reference to the scant legislative history describing the alien exemption provision (EEOC Br. 29 n.27), the EEOC is arguing that the plain definition of "employer" in the statute does not really mean what it says. It is further suggesting that the statute can be rewritten by reliance on that early, limited legislative history relating to a different provision in a different bill (H.R. 405) or by resort to the economic effects cases that are in no way applicable here. *See supra* 32 n.25.[32]

To apply Title VII extraterritorially also is inconsistent with the venue provisions which, insofar as may be relevant here, provide for venue only in a judicial district in the state where certain matters related to the employer occurred or were located. 42 U.S.C. § 2000e-5(f)(3). While the EEOC points out that some employers operating abroad "may" meet one of these venue provisions within the United States (EEOC Br. 19), others clearly would not. For example, there would be no venue as to a U.S.-incorporated or foreign corporation with no place of business in the United States. Thus, the limitations on venue to the United States would not be so easily avoided as the EEOC suggests.

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to determine whether Title VII applies, including the foreign employer's nationality, whether the foreign employer is doing "further business" in the United States and whether the alleged discriminatory act has a connection to "the business in the United States." *Id.*

[32] In contrast to the EEOC's argument, the ACLU asserts that Congress would not have intended to apply Title VII to "alien employers of Americans abroad" because in 1964 it would have been considered "an unwarranted exercise of jurisdiction"; therefore, "[t]his interpretation should . . . be disfavored." ACLU Br. 29. *Cf. Lavrov* v. *NCR Corp.*, 600 F. Supp. 923, 931 (S.D. Ohio 1984) (foreign employers outside the United States are not "employers" covered by Title VII, because specific congressional intent is needed to extend coverage to foreign employers, citing *Benz* and *McCulloch*.)

Similarly, the investigative authority provided in the original Title VII strongly suggests that no thought was given by Congress to extraterritorial coverage. The EEOC's subpoena power originally extended only to the "State" where the witness resided or the documents sought were kept, and the EEOC could not require production beyond that State. Pub. L. No. 88-352, § 706(f), 78 Stat. 241 (1964). The provision was amended in 1972, but the current statutory language still permits the EEOC only to issue subpoenas for witnesses and documents from "any place in the United States or any Territory or possession thereof." 42 U.S.C. § 2000e-9. This language hardly suggests authorization to export Title VII's law and procedures worldwide.[33]

In order to sustain the argument that Congress in 1964 intended Title VII to apply abroad, the EEOC must ignore the absence of provisions addressing conflicts with foreign law, rewrite the definition of employer and overlook the limitations on venue and investigative authority, thus demonstrating that the structure of Title VII is not consistent with the EEOC's view that Title VII was intended to be applied extraterritorially.

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[33] The subpoena power of the EEOC becomes particularly problematic if Title VII applies either to foreign employers or even just to activities within foreign countries. The EEOC argues that similar language to that in Title VII has been interpreted to require production of documents where individuals within the United States were served with subpoenas for documents located elsewhere. EEOC Br. 20 n.12. Such "comparable statutes" have been held inadequate, however, to compel the appearance of a foreign citizen either in a foreign country or in the United States. *See, e.g., CFTC* v. *Nahas*, 738 F.2d 487 (D.C. Cir. 1984). Thus, where the investigation in a particular case involves foreign witnesses, the EEOC would lack the necessary investigative power.

E. Congress Could Not Have Intended In 1964 To Impose Our Method Of Dealing With Employment Discrimination On The Many Nations That Have Entered Into Treaties And Conventions Or Adopted Their Own Laws To Deal With Such Matters.

There are sensitive and sometimes vast cultural differences between this nation and other sovereign states, many of which already regulate employment discrimination through their own laws. At least 55 nations, including Saudi Arabia, have employment discrimination laws of their own.[34] Some nations provide greater protection than does the United States, and each nation has its own laws and procedures to deal with discrimination in its territory. The fact that the international community may share the *goal* of eliminating discrimination by adopting "many conventions deploring discrimination" and that deal specifically with employment discrimination (Int'l Human Rights Br. 46 n.9), is not support for imposing Title VII on other countries. In fact, it strongly suggests that Congress could not have intended to impose U.S. substantive and procedural law on the many nations that have ratified such treaties and conventions or enacted laws to deal with such matters in their own way.

The International Labour Organization Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation, 362 U.N.T.S. 31 (1958) ("ILO Convention 111") cited by the International Human Rights Law Group (Int'l Human Rights Br. 58), was in existence when Congress passed Title VII. ILO Convention 111—ratified by Saudi Arabia and 110 other nations but not by the United States—obligates each party "to declare and pursue a national policy designed to promote, *by methods appropriate to national conditions and practice*, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof." ILO

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[34] International Labour Organization, *Legislative Services, General Subject Index 1919-1989* (1989).

Convention 111, art. 2 (emphasis added) (Int'l Human Rights Br. App. A-2). Each member undertakes "*by methods appropriate to national conditions and practice* . . . to enact such legislation . . . as may be calculated to secure the acceptance and observance of the policy." *Id.*, art. 3 (emphasis added).[35]

The Labor and Workmen Law of Saudi Arabia regulates "all employment" within the borders of Saudi-Arabia, "including that of citizens of foreign countries." J.A. 27.[36] It contains numerous substantive provisions, some of which deal with employment discrimination,[37] and "a procedural framework consisting of two judicial commissions by which aggrieved persons may vindicate their rights under the code." *Id. See* Labor and Workmen Law of Saudi Arabia, arts. 172-188. These commissions "make no distinction between citizens of Saudi Arabia and foreign nationals who work in Saudi Arabia." J.A. 27.

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[35] As a member of the ILO, the United States has a continuing obligation under article 19, section 7, of the Constitution of the ILO, to bring a Convention "before the authority or authorities within whose competence the matter lies for the enactment of legislation or other action." Although the United States is not a party to ILO Convention 111, it continues to recognize its obligation under article 19, section 7, and in fact, is presently reconsidering ratification of ILO Convention 111. 136 Cong. Rec. S1200 (daily ed. Feb. 20, 1990) (statement of Sen. Hatch). It is implicit then that the United States has an obligation not to interfere with the application of ILO Convention 111, even though the United States has not yet ratified it. *See* Constitution of the ILO, art. 26. Similarly, under article 18 of the Vienna Convention on the Law of Treaties the United States must refrain from interfering with the operation of the ILO in general and ILO Convention 111 in particular. *See* S. Exec. Doc. L., 92d Cong., 1st Sess. 6 (1971).

[36] The Labor and Workmen Law of Saudi Arabia was included in its entirety at Tab B to the Appendix to Aramco's Brief in the court below.

[37] *See* in particular Labor and Workmen Law of Saudi Arabia, arts. 22, 48, 49, 78, 80, 91, 160.

While both the EEOC and various amici argue that the application of Title VII abroad would create "no serious potential for conflicts with international norms or the laws of foreign states" (EEOC Br. 25; *see* Int'l Human Rights Br. 53-61; Lawyers Comm. Br. 28-29), just the opposite appears to be the case. Serious conflicts with the specific laws of other countries—which have chosen to deal with discrimination by enacting legislation pursuant to their treaty obligations and otherwise "by methods appropriate to national conditions and practices"—would be inevitable if Title VII were applied overseas. Congress could not have intended to create such direct conflicts between U.S. requirements and procedures for dealing with discrimination in the workplace and those of other nations.

The Governments of the United Kingdom, Canada and Australia have presented Diplomatic Notes to the United States Department of State with respect to this case, and their statements underscore precisely this point.[38] The Government of Great Britain states that the application of Title VII in the United Kingdom could give rise to a "direct conflict" with U.K. law and policy:

> [I]f the Supreme Court should now determine that Title VII has extraterritorial application, this could in some cases give rise to direct conflict with UK law and policy, especially if affirmative action requirements are imposed. Such conflict could have serious consequences for an employer who operated both in the United States and in the UK.

Diplomatic Note No. 429 from Her Britannic Majesty's Embassy (Dec. 11, 1990) (App. 6a).[39]

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[38] Diplomatic Note No. 429 from Her Britannic Majesty's Embassy, dated December 11, 1990, is included as Appendix B hereto. Diplomatic Note No. 177 from the Embassy of Canada, dated December 12, 1990, is included as Appendix C hereto. Diplomatic Note No. 370 from the Embassy of Australia, dated December 12, 1990, is included as Appendix D hereto.

[39] The Government of Canada notes that its own "law and policy in this field reflect objectives and standards *similar* to those of Title VII." Diplomatic Note No. 177 from the Embassy of Canada (Dec. 12, 1990) (App. 8a) (emphasis added). "The Government of Canada would be concerned, however, were the provisions of Title VII to be applied extraterritorially without regard to the law of the place where the conduct occurs." *Id.* It suggests that there is a genuine possibility of "conflict with the law and policy of the territorial state," at least absent sensitivity to "the principles of comity and respect for sovereignty." *Id.* The Government of Australia says almost precisely the same thing and urges that if Title VII is held to apply extraterritorially the legislation should be applied "so as to be consistent with the principles of comity and respect for sovereignty, thus avoiding any conflict with the law and practice of the territorial state." Diplomatic Note No. 370 from the Embassy of Australia (Dec. 12, 1990) (App. 10a).

"[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. at 21 (quoting *Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)); Restatement (Third) § 114 reporters' note 1. In view of the treaty obligations of 111 nations—excluding our own, whose policies and values the EEOC and amici seek to impose on the rest of the world—and the views expressed by the Governments of the United Kingdom, Australia and Canada, it would be wrong to infer that Congress intended to extend Title VII to foreign workplaces.

II. THE EEOC'S CURRENT INTERPRETATION OF TITLE VII IS ENTITLED TO NO DEFERENCE BECAUSE IT IS NEITHER SUPPORTED BY THE STATUTE, CONTEMPORANEOUS WITH ENACTMENT OF TITLE VII NOR CONSISTENT WITH PRIOR POSITIONS TAKEN BY THE AGENCY.

The EEOC contends that it has "consistently construed" Title VII to apply to U.S. citizens working abroad. EEOC Br. 22. Citing a 1975 letter from the EEOC's General Counsel, 1983 testimony by its Chairman and a 1985 decision by the Commission, it argues that its administrative interpretations "reinforce" the conclusion that Congress intended Title VII to apply abroad. *Id.* at

23. The EEOC does not mention, however, its numerous other pronouncements that demonstrate it has been far from consistent in its view, over the 26 years since enactment of Title VII, as to whether Title VII applies extraterritorially.

From 1964 until 1970 the EEOC was silent on the issue of Title VII's extraterritorial application. In 1970, it issued a regulation stating:

> Title VII of the Civil Rights Act of 1964 protects all individuals, *both citizen and noncitizens, domiciled or residing in the United States*, against discrimination on the basis of race, color, religion, sex, or natural origin.

29 C.F.R. § 1606.1(c) (1970) (emphasis added); J.A. 46. This regulation was amended to delete the "both citizens and noncitizens, domiciled or residing" language in 1980, sixteen years after Congress enacted Title VII. 45 Fed. Reg. 85,633 (1980). Nothing was substituted for the deleted language, and today the regulation remains silent on the geographic reach of the statute.

In 1975, the General Counsel of the EEOC wrote a letter to the Senate Foreign Relations Committee in support of the extraterritorial application of Title VII. EEOC Br. 22. His statement, which was not reflected in the agency's policy guidelines for another 13 years, was in conflict with the agency's regulation then in force.[40]

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[40] In the same year then-Assistant Attorney General Scalia testified before a Senate Subcommittee (EEOC Br. 24) and stated that the alien exemption provision of Title VII "implies" that Title VII is "applicable to the employment of United States citizens by covered employers anywhere in the world." *Foreign Investment and Arab Boycott Legislation: Hearings Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing and Urban Affairs* ("*Senate Hearing*"), 94th Cong., 1st Sess. 165 (1975); *Discriminatory Arab Pressure on U.S. Business: Hearings Before the Subcomm. on International Trade and Commerce of the House Comm. on International Relations* ("*House Hearing*"), 94th Cong., 1st Sess. 86 (1975). In 1975, however, the EEOC and not the Justice Department had civil enforcement responsibility with respect to Title VII (*see Senate Hearing* at 165; *House Hearing* at 86), and the testimony was at variance with the position of the EEOC in 1975 that Title VII applied only to individuals "domiciled or residing in the United States." 29 C.F.R. § 1606.1(c) (1970); J.A. 46. Furthermore, the primary purpose of the testimony was to express the Administration's view that Arab boycott legislation was not needed because of the suggestion that Title VII might already fully protect U.S. citizens. Congress apparently disagreed because it approved separate antiboycott bills in 1976 and enacted legislation in 1977. *See* 50 U.S.C. App. § 2407 (prohibiting "any United States person" from refusing to employ "or otherwise discriminating against any United States person on the basis of race, religion, sex, or national origin of that person. . . .").

In 1983 the chairman of the EEOC testified before a Senate committee considering amendments to the Age Discrimination in Employment Act to the effect that Title VII applied extraterritorially to *U.S. employers* of U.S. citizens.[41] In 1985, the EEOC rendered a decision holding that Title VII "does apply to *covered employers* with respect to their employment of U.S. citizens outside the United States," despite its own recognition at the time that Title VII "contains no [statutory] provision specifically addressing its territorial reach" and that "the legislative history of the Act is similarly silent on this issue." Decision No. 85-16, Emp. Prac. Guide (CCH) § 6857 at 7072 (1985) (emphasis added).

It was not until 1988, 24 years after the passage of Title VII, that the EEOC articulated any policy on what it now asserts was the clear intent of Congress to reach either U.S. employers or "covered employers" of U.S. citizens abroad. In September 1988, immediately before the panel decision in this case was announced but after oral argument, the EEOC issued a general policy statement that Title VII applies to employers, including foreign employers, of U.S. citizens in foreign countries. Policy Statement No. 88-15, EEOC Compl. Man. (CCH) ¶ 2187 (1989). Absent any legislative history specifically dealing with the application of Title VII to U.S. citi-

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[41] *Age Discrimination and Overseas Americans, 1983: Hearing Before the Subcomm. on Aging of the Senate Committee on Labor and Human Resources*, 98th Cong., 1st Sess. 2-4 (1983) (testimony of Clarence Thomas).

zens employed abroad, the EEOC in its policy guidance drew upon the supposedly broad "commerce power" of Congress to suggest that Title VII was intended to apply to any employer "affecting commerce."

Against this background, the Court should determine the intent of Congress by using the traditional tools of statutory construction, including the presumption against extraterritorial application involved here. Any agency view of the statute that is inconsistent with that intent must be disregarded. *NLRB* v. *United Food & Commercial Workers Union*, 484 U.S. 112, 123 (1987). No deference is due to an agency's interpretation of a statute that is not supported by the language of the statute or its legislative history. *Mohasco Corp.* v. *Silver*, 447 U.S. 807 (1980); *Southeastern Community College* v. *Davis*, 442 U.S. 397, 411-12 (1979). "Courts need not defer to an administrative construction of a statute where there are 'compelling indications that it is wrong.'" *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86, 93-94 (1973).

Similarly, agency positions that either conflict with earlier positions or that were not contemporaneous with enactment of the statute deserve no deference. *Southeastern Community College* v. *Davis*, 442 U.S. at 412 n.11; *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. at 93-94; *see General Electric Co.* v. *Gilbert*, 429 U.S. 125, 142 (1976) ("[an EEOC guideline respecting Title VII] first promulgated eight years after the enactment of that Title" that "flatly contradicts" an earlier agency position "enunciated closer to the enactment of the governing statute" is not entitled to deference). The EEOC's interpretation of Title VII here has been neither contemporaneous with the statute's enactment nor consistent over the 24 years since enactment.

The jurisdictional reach of Title VII is a matter for Congress to decide. No deference need be given to an agency's position on matters such as the scope of its own jurisdiction unless its position is consistent with the administrative structure that Congress enacted. *ETSI Pipeline Project* v. *Missouri*, 484 U.S. 495, 516-17 (1988); *Mohasco Corp.* v. *Silver*, 447 U.S. at 825. *See CFTC* v. *Nahas*, 738 F.2d 487, 495 n.17 (D.C. Cir. 1984) ("judicial deference to an agency's interpretation of its investigative authority is not justified when the agency's action may have extraterritorial impact"). To defer to the EEOC here would be to permit it to speak where Congress has not.

III. SOUND POLICY REASONS SUPPORT THE JUDGMENT OF THE COURTS BELOW THAT TITLE VII SHOULD NOT BE APPLIED TO OVERSEAS WORKPLACES UNLESS CONGRESS CLEARLY INDICATES THAT IT SHOULD.

The extraterritorial application of Title VII would create serious conflicts with the laws of other countries and the operation of multinational corporations around the world. Many multinational companies employ work forces composed of individuals from many nations and religious groups. If Title VII were held to apply to United States citizens employed overseas, multiple employment systems depending upon the citizenship of particular employees would be required within companies.[42] Foreign employers,

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[42] Through various hypotheticals, Petitioner Boureslan makes the policy argument that the decision below permits U.S. companies to "launder" their discrimination by shipping employees overseas and then firing them, leaving the terminated employees with no recourse to the protections provided by Title VII. Boureslan Br. 8-15. In fact, however, the hypotheticals are already addressed under Title VII without reading into the Act an intent that it apply extraterritorially. In each hypothetical either the alleged discriminatory conduct actually takes place in the United States, or as the Seventh Circuit explained in *Pfeiffer* v. *Wm. Wrigley, Jr. Co.*, 755 F.2d 554 (7th Cir. 1985), the "relevant work station" is in the United States. A U.S. citizen working for a U.S. company in the United States subjected to discrimination while on a foreign business trip would be regarded as having a U.S. work station, with the foreign business trip but an incidental part of that U.S. employment relationship. Similarly, an employee who is denied a transfer or an overseas assignment for a discriminatory reason is the object of discrimination in the United States. *See Abrams* v. *Baylor College of Medicine*, 805 F.2d 528 (5th Cir. 1986).

to which the Act would apply by its own terms and under existing EEOC policy (*see supra* 36-37), might well choose to forego employing U.S. citizens at all in order to avoid such difficulties. *See The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972) (the "expansion of American business and industry will hardly be encouraged if . . . we insist on a parochial concept that all disputes must be resolved under our laws and in our courts.")

The absence of any statutory guidance in treating the difficult conflicts that would arise necessarily would lead to increased litigation to resolve them. Determining the applicability of Title VII on a case-by-case basis and relying on the EEOC and the courts to "minimize conflicts of jurisdiction by exercising a jurisdictional rule of reason in individual cases," as the EEOC and the dissent below suggest (Pet. App. 25a; *see* EEOC Br. 28), would invite a needless proliferation of litigation on social and policy questions that would add to the burdens on our courts and cause unnecessary friction with friendly sovereigns.[43]

It is not enough to assert (EEOC Br. 31-32) that the 1984 amendments to the ADEA underline a congressional determination to apply anti-discrimination legislation abroad, and to urge that the holding below creates "an anomaly" that Congress never intended between the reach of Title VII and the ADEA. EEOC Pet. 12-13.[44] As the

[43] Indeed, a similar case-by-case balancing approach, at one time used by the National Labor Relations Board under the National Labor Relations Act, was rejected by this Court in *McCulloch* v. *Sociedad Nacional de Honduras*, 372 U.S. at 19, in favor of "the affirmative intention of the Congress clearly expressed." *Id.* at 22 (quoting *Benz*, 353 U.S. at 147).

[44] Reliance on the supposed "anomaly" is little more than an argument that Senator Grassley believed in 1984 that the ADEA as originally written in 1967 applied abroad because its "substantive provisions" were "worded nearly exactly as those in Title VII's" and that Title VII applied to employers of U.S. citizens abroad. 129 Cong. Rec. 34,499 (Nov. 18, 1983). Senator Grassley based his comment on two district court opinions, *Love* and *Bryant*, one of which stated that conclusion in *dicta* (*Love*) and the other of which was subsequently reversed on appeal (*Bryant*). *Id. See* discussion

EEOC has conceded, the legislative history of the 1984 ADEA amendments is not "indicative of the intent of the 1964 Congress that enacted Title VII." EEOC Pet. 13 n.10.

Far from demonstrating congressional intent in 1964, the 1984 amendments to the ADEA are an instructive example of how Congress speaks directly and specifically when it intends legislation to apply extraterritorially. In the 1984 amendments, Congress changed the ADEA's definition of employee expressly to include "any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country." 29 U.S.C. § 630(f). It redefined the term "employer" to make clear that what it intended to cover was U.S. employers and only those foreign employers "controlled" by U.S. corporations. 29 U.S.C. § 623(h)(1). It expressly excluded employers "not controlled by an American employer" and expressly set out the factors constituting "control." 29 U.S.C. § 623(h)(2). And it provided a statutory defense to a discrimination charge where compliance with the ADEA would cause an employer to violate the laws of the country in which the workplace is located. 29 U.S.C. § 623(f)(1).

Thus, only Congress should decide whether particular U.S. laws should govern workplaces in foreign nations where U.S. citizens are employed. But Congress has not done so in respect of Title VII, and the court below properly declined to make the policy choice that is assigned to Congress. Congress "alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are

supra 33-34. Moreover, six courts of appeals said that the ADEA did not apply extraterritorially before it was amended and even the EEOC agreed. *See Age Discrimination and Overseas Americans, 1983: Hearing Before the Subcomm. on Aging of the Senate Comm. on Labor and Human Resources*, 98th Cong., 1st Sess. 1-4 (1983) (Remarks of Sen. Grassley and Testimony of Clarence Thomas).

so evident and retaliative action so certain." *Benz* v. *Compania Naviera Hidalgo*, 353 U.S. at 147.

CONCLUSION

For these reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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December 17, 1990

APPENDICES

APPENDIX A

Relevant provisions of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17:

§ 2000e. Definitions

For the purposes of this subchapter— • • •

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

• • • •

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of

a State government, governmental agency or political subdivision.

• • • •

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

• • • •

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959, and further includes any governmental industry, business, or activity.

• • • •

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf Lands defined in the Outer Continental Shelf Lands Act.

• • • •

§ 2000e-1. Subchapter not applicable to employment of aliens outside State and individuals for performance of activities of religious corporations, associations, educational institutions, or societies

This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

§ 2000e-2. Unlawful employment practices

Employer practices

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Relevant provisions of the Age Discrimination Act of 1967, 29 U.S.C. §§ 621-634:

§ 623. Prohibition of age discrimination

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be lawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

• • • •

(h) Practices of foreign corporations controlled by American employers; foreign persons not controlled by American employers; factors determining control

(1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.

(2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.

(3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the—

(A) interrelation of operations,

(B) common management,

(C) centralized control of labor relations, and

(D) common ownership or financial control,

of the employer and the corporation.

§ 630. Definitions

For the purposes of this chapter— • • •

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term "employee" includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

• • • •

APPENDIX B

DIPLOMATIC NOTE NO. 429

Her Britannic Majesty's Embassy present their compliments to the Department of State and have the honour to refer to the case of Boureslan v Aramco, Arabian American Oil—653—F. Supp. 629 (S.D. Tex. 1987), *aff'd.*, 857 F.2d 1014 (5th Cir. 1988), *reh'g granted, en banc*, 863 F.2d 8 (5th Cir.), and adopted *en banc* 892 F.2d 1271 (5th Cir. 1990), *cert. granted* 1990 US Lexis 4313, 59 U.S.L.W. 3243 (Oct. 1, 1990). An appeal to the Supreme Court of the United States is pending. That Court is asked to decide whether Title VII of the Civil Rights Act applies to employment discrimination outside the United States by an American corporation against an American citizen.

Like the United States Government the British Government is fully committed to the principle of non-discrimination on the grounds of race or sex. This is reflected in our legislation and practice. Nevertheless if the Supreme Court should now determine that Title VII has extraterritorial application, this could in some cases give rise to direct conflict with UK law and policy, especially if affirmative action requirements were imposed. Such conflict could have serious consequences for an employer who operated both in the United States and in the UK.

If the Supreme Court finds that as a matter of construction Title VII applies extraterritorially, the British Government hopes that the Court will conclude that it may be given extraterritorial effect only to the extent consistent with international law, particularly the principles of sovereignty and comity; and would expect the United States authorities to act consistently with these principles.

Her Britannic Majesty's Embassy avail themselves of this opportunity to renew to the Department of State the assurance of their highest consideration.

[SEAL]

11 December 1990

BRITISH EMBASSY
WASHINGTON DC

APPENDIX C

[EMBLEM]

Canadian Embassy Ambassade du Canada

Note No. 177

The Embassy of Canada presents its compliments to the Department of State, and wishes to bring to the attention of the Department its concerns respecting issues raised in the case of Boureslan v. Aramco, Arabian American Oil, 653 F. Supp. 629 (S.D. Tex. 1987), *aff'd.*, 857 F. 2d 1014 (5th Cir. 1988), *reh'g granted, en banc*, 863 F. 2d 8 (5th Cir.), and adopted, *en banc*, 892 F. 2d 1271 (5th Cir. 1990), *cert. granted*, 59 U.S.L.W. 3243 (Oct. 1, 1990) currently before the Supreme Court of the United States. The Government of Canada notes that the Court is being asked to determine whether the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., should be applied extraterritorially to actions taken abroad against U.S. citizens by companies incorporated in the United States.

Canadian law and policy in this field reflect objectives and standards similar to those of Title VII. The Government of Canada would be concerned, however, were the provisions of Title VII to be applied extraterritorially without regard to the law of the place where the conduct occurs. If the Court decides that, as a matter of statutory interpretation, these provisions must be given extraterritorial effect, the Government of Canada would hope that guidance would be provided consistent with international law on their application outside the United States. In particular, the Government would expect that the provisions would be applied in a manner fully consistent with international law, as well as with the principles of comity and respect for sovereignty, thereby avoiding conflict with the law and policy of the territorial state.

The Embassy of Canada avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

Washington, D.C.
December 12, 1990

[SEAL]

APPENDIX D

NOTE NO. 370

The Embassy of Australia presents its compliments to the Department of State, and has the honour to refer to the case of Boureslan v Aramco, Arabian American Oil, 653 F. Supp, 629 (S.D. Tex. 1987), *aff'd*, 857 F.2d 1014 (5th Cir. 1988), *reh'g, granted, en banc*, 863 F.2d 8 (5th Cir.), and adopted *en banc*, 892 F.2d 1271 (5th Cir. 1990), *cert granted* 1990 US Lexis 4313, 59 U S L W 3243 (Oct. 1, 1990) which is currently on appeal to the Supreme Court of the United States. The Government of Australia understands that the question to be determined by the Court is whether Title VII of the Civil Rights Act of 1964, 42 USC § 2000e et seq., should be given extraterritorial application to employment discrimination by companies incorporated in the United States against citizens of the United States overseas.

The Government of Australia is committed to objectives and standards which are similar to those of Title VII and are reflected in its law and practice in this area. Should the Court decide that, as a matter of construction, Title VII applies extraterritorially, the Government of Australia would hope that due regard would be had to international law in the application of the legislation outside the United States. It follows that the Government of Australia would expect that the legislation would be applied so as to be consistent with the principles of comity and respect for sovereignty, thus avoiding any conflict with the law and practice of the territorial state. The Government of Australia would be concerned if Title VII was applied extraterritorially without regard to the law of the place where the relevant conduct occurs.

The Embassy of Australia avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

[SEAL]

Washington D.C.
December 12, 1990